# No. 8363

# United States Circuit Court of Appeals

## For the Ninth Circuit

OLIVE LEMM, Individually, and as Administratrix of the Estate of CHARLES LEMM, Deceased,

*Appellant,*

vs.

NORTHERN CALIFORNIA NATIONAL BANK, THE REDDING SAVINGS BANK AND CARR AND KENNEDY, a Co-partnership,

*Appellees.*

## APPELLANT'S OPENING BRIEF

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

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## APPELLANT'S OPENING BRIEF

**Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.**

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### JURISDICTION

Appellant filed her petition under Section 75 of the Bankruptcy Act in the United States District Court for the Northern District of California, Northern Division, which petition was approved by that Court

as being properly filed under said section. The United States District Courts are "courts of bankruptcy" and have original jurisdiction in proceedings under the Bankruptcy Act.

*Bankruptcy Act of 1898,* as amended, Section 2, (U. S. C. A. Title 11, Sec. 11);

*Constitution of the United States,* Art. III, Section 2;

*Debtor's Petition in Proceedings Under Section 75,* as amended, of the Bankruptcy Act (Printed Transcript, page 1);

*Order approving Debtor's Petition* (Printed Transcript, page 9).

By this appeal the United States Circuit Court of Appeals for the Ninth Circuit, sitting as a court of equity, is asked to revise the proceedings of the United States District Court within the Ninth Circuit. It is Appellant's contention that the United States District Court erred as a matter of law in dismissing the proceedings for a composition or extension agreement. The United States Circuit Court of Appeals has jurisdiction to hear this appeal.

*Bankruptcy Act of 1898,* Section 24 (b) (U. S. C. A. Title 11, Sec. 47 (a));

*Assignments of Error* (Printed Transcript, page 34);

*Order Allowing Appeal* (Printed Transcript, page 37).

## STATEMENT OF THE CASE

Appellant is a debtor-farmer petitioning under Section 75 of the Bankruptcy Act, and she is appealing from an order dismissing her proceedings.

Appellant filed her petition and schedules (Proceeding number 6575) under Section 75 of the Bankruptcy Act on November 22nd, 1935, and her petition was approved as properly filed by an order of the United States District Court, dated November 25th, 1935 (Printed Transcript, pages 17 to 24). These proceedings were dismissed on June 15th, 1936, on the ground that no composition or extension agreement had been reached (Printed Transcript, pages 14, 15) and an amended petition under Section 75(s) which had theretofore been filed by appellant was likewise dismissed, but the grounds of this dismissal were not stated.

Appellant filed a second petition and schedules (Proceeding number 6935) under Section 75 of the Bankruptcy Act on June 22nd, 1936, and an order approving her petition was signed June 23rd, 1936 (Printed Transcript, pages 1 to 9). The appellees, here, petitioned for a dismissal of these proceedings, number 6935, and on the 22nd day of September, 1936, these proceedings were dismissed upon the ground that the former proceedings, number 6575, constituted a bar to appellant's subsequent attempt to reach a composition or extension agreement with her creditors.

## ASSIGNMENTS OF ERROR

Upon this appeal, appellant will rely upon the following Assignments of Error:

Assignments of Error, 4, 5, 6 and 8 (Printed Transcript, page 35).

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## ARGUMENT

The primary question raised by this appeal is whether or not a debtor-farmer who had filed a petition under Section 75 (a-r), of the Bankruptcy Act, 11 U. S. C. A. 203, and subsequently filed an amended petition under Section 75 (s), as amended, may file a subsequent proceeding under Section 75 (a-r) in an attempt to reach a composition or extension agreement with her creditors, after dismissal of the prior proceedings.

This question must be answered in the affirmative. There is no provision in the Bankruptcy Act stating that a proceeding under one section of the Act is a bar to a subsequent proceeding under another section, or even under the same section.

The prohibition in the Bankruptcy Act against successive discharges within one six year period has no application, where a mere voluntary proceeding for a composition or extension has been instituted. There has not been, and in fact could not be in this proceeding, a division of the debtor's non-exempt property between her creditors without the creditors' consent.

*Bankruptcy Act of United States,* Sec. 14(b) 5, 11 U. S. C. A. 32(b) 5.

Reason likewise supports the affirmative answer to our query. It is entirely possible that at one particular time, possibly during a period of financial stress, an amicable agreement between a debtor and her creditors could not be reached, while at a later time under improved financial conditions such an agreement would be possible. The policy of the law is to favor amicable settlements of the financial affairs of distressed debtors, Section 75 (a-r) being a statutory example of this policy. An examination of its terms will show that creditors are amply protected from any reduction of obligation or unreasonable extension of time for payment, to which they do not agree.

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## I.

4. **PETITIONER ASSIGNS AS ERROR THE RULING THAT DEBTOR'S PETITION WAS FILED WITHOUT AUTHORITY OF LAW (PRINTED TRANSCRIPT, PAGE 35).**

Petitions under Section 75 (a-r) for a composition or extension may be filed at any time prior to March 3, 1938 by debtor-farmers who are insolvent or unable to meet their debts as they mature.

*Bankruptcy Act,* Section 75 (c);

Section 75 (c) has not been amended, and Section 75 (a-r) is constitutional.

*Collins v. Welch,* 75 Fed.(2nd) 894;
*In re O'Brien,* 78 Fed.(2nd) 715.

Consequently debtor's petition was filed by express authority of law, having been filed on June 22, 1936, by a farmer who was unable to meet her debts as they matured, and who desired to effect a composition or extension of her debts.

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## II.

5. CREDITORS' MOTION STATES THAT A DISMISSAL OF PROCEEDINGS UNDER SECTION 75S AS AMENDED (NEW FRAZIER-LEMKE ACT) CONSTITUTES A BAR TO THE PROCEEDINGS UNDER SECTION 75 (A TO R). PETITIONER ASSIGNS AS ERROR THE ORDER OF DISMISSAL MADE UPON THIS GROUND.

6. CREDITORS' MOTION STATES THAT THE UNITED STATES DISTRICT COURT HAS NO JURISDICTION OF PROCEEDINGS FILED UNDER SECTION 75 (A TO R) FOR A COMPOSITION OR EXTENSION WHERE PRIOR PROCEEDINGS IN WHICH DEBTOR WAS ADJUDICATED A BANKRUPT UNDER 75S WERE DISMISSED. THIS REASON FOR THE ORDER OF DISMISSAL BEING IN FACT THE SAME AS THE NEXT PRECEDING ALLEGED RULE AND BEING EQUALLY UNSOUND IS ALSO ASSIGNED AS ERROR (PRINTED TRANSCRIPT, PAGE 35).

The filing of a petition under Section 75 (a-r) may be considered as a request by a debtor-farmer for a meeting with her creditors for the purpose of discussing her financial affairs and arriving at an agreement for the composition or extension of her debts. Any action taken in such a proceeding must necessarily be voluntary. There is no "litigation" as this term is commonly used. Neither party is in fact a plaintiff or defendant.

There are numerous reasons why a debtor and her creditors may be unable to reach an agreement at a particular time. The market value of her assets may make her offer unattractive, or a creditor or group of creditors may refuse absolutely to attend meetings before the Conciliation Commissioner and consider the debtor's plan of rehabilitation. A failure to reach an agreement, for any cause whatsoever, may properly result in dismissal, as did the first proceeding instituted by debtor.

Appellees, however, take the position that because appellant has once petitioned for the right to negotiate with her creditors in the orderly manner provided by law, she may never again offer her creditors a proposal for a new agreement, regardless of how much conditions may have changed.

A failure to reach an agreement is only a temporary disability. Increased land values, better income yield, advanced prices for crops and livestock, have often changed a case from one of hopeless insolvency to one in which an agreement may be reached under which creditors are paid and a fair equity returned to the debtor.

### A. Successive Petitions Permissible in Bankruptcy.

There is no prohibition against successive proceedings in bankruptcy providing the limitation against more than one discharge within a six year period is respected.

> "Section 32 (b), subdivision 5, of Title 11 U. S. C. A., Bankr. Act. par. 14b (5), as amended,

> is a bar to the bankrupt's discharge, as he was adjudicated a bankrupt herein upon his voluntary petition within six years after his first discharge in bankruptcy. Section 32 (b) subdivision 5 of the Bankruptcy Act bars a discharge within the six year period, but does not bar the filing of a petition in bankruptcy. This court has jurisdiction to receive successive petitions in bankruptcy and make successive adjudications in bankruptcy within the six-year period. The court is only limited in its jurisdiction to the granting of one discharge to the bankrupt within the six-year period. See In re Smith (D. C.) 155 F. 688; In re Little (C. C. A.) 137 F. 521; In re Johnson (D. C.) 233 F. 841."

*In re Epstein,* 12 Fed. Supp. 450.

Likewise it has been held that after the termination of a proceeding under Section 75 (a-r), an ordinary bankruptcy petition may be filed, and an adjudication made.

*In re Neumann,* 12 Fed. Supp. 427;
*McKeever v. Local Finance Company,* 80 Fed.(2nd) 449.

Conversely, an ordinary bankruptcy proceeding which has been terminated by a discharge, is not a bar to a petition for a composition or extension.

It is not logical to contend in the face of these authorities that a proceeding for a composition which is essentially a voluntary proceeding may not be commenced after the termination of a prior proceeding for the same purpose.

**B. Doctrine of Res Adjudicata Not Applicable.**

It is clear that the doctrine of res adjudicata has no application here. The mere dismissal of proceedings under Section 75 (a-r) is not a determination of an action or proceeding, since no composition or extension agreement was ever submitted to the District Court for confirmation. No question of law or fact was, or could have been, decided in the absence of an application for confirmation of a plan. Appellant did not seek any recovery from her creditors, nor even a definition of her rights as against them. She merely sought the facilities of the federal courts, established under Section 75 (a-r), through which to effect an amicable agreement with them. It could not be said that she would not have the right to negotiate with her creditors and if possible reach an agreement, outside the bankruptcy proceeding, yet appellees would deny appellant the right to seek this agreement under the Bankruptcy Act where she must voluntarily list her assets and be subject to the control and supervision of the court.

There are two further considerations, however, which entirely remove any possibility of an application of the "res adjudicata" doctrine. Appellant *herself* petitioned for the dismissal of her first petition (#6575) under Section 75 (a-r) of the Bankruptcy Act, and, to quote from the affidavit of counsel for appellees, "That on the 15th day of June, 1936, in the above entitled court an order was made by Hon. Michael J. Roche, District Judge, dismissing the proceedings taken by said debtor under Section

75 (a-r), *in accordance with her Motion for Dismissal,* above set forth" (Printed Transcript, pages 12-13). Thus we see that the dismissal was upon the voluntary motion of appellant herself, and was not, therefore, a decision on the merits as to any material fact at issue in the proceeding. At most a dismissal is evidence that the appellant and her creditors were not, at a particular time or under existing circumstances, able to reach an agreement. The right of appellant to have the proceedings dismissed upon her own motion in the absence of a counter-claim, is well settled (*Code of Civil Procedure of the State of California,* Sec. 581 (1)). Having dismissed her proceeding she is at liberty to file a new petition for the same relief within the limitation of time set by law.

But there is another reason why appellant should have been allowed to maintain the proceeding for a composition or extension. An adjudication, and even a discharge in bankruptcy, is not a bar to a subsequent proceeding for a composition or extension. Examining the facts here, we find that appellant prior to the 15th day of June, 1936, filed an amended petition under Section 75 (s) of the Bankruptcy Act, asking to be adjudged a bankrupt. Applying the rule just announced appellant was entitled, at the termination of the bankruptcy proceeding, which took place on June 15, 1936, to file a petition for a composition or extension.

The case of *Phoenix Bank v. Ledwidge,* 86 Fed.(2nd) 355, which closely resembles this case upon

the facts, is illustrative in this connection. There the debtor's second petition under Section 75 (a-r) was dismissed, not, however, because the first proceeding was res adjudicata, but solely because it appeared that the only relief open to the debtor was to file an amended petition under Section 75 (s) of the Bankruptcy Act, as amended, and in the opinion of that Court section 75 (s) as amended, was unconstitutional. The Supreme Court has exposed the fallacy of this part of the decision in the case of *Wright v. Vinton Branch Bank,* 81 L. E. 487, holding Section 75 (s) to be constitutional. It is submitted that had the *Phoenix Bank* case been decided upon the premise that the amendment of Section 75 (s) was constitutional, the debtor's petition would not have been dismissed. It may be noted in that case also, debtor had filed an amended petition under Section 75 (s) after the first petition under 75 (a-r) had been filed.

Even in the event that appellant is unable to reach the composition or extension agreement she seeks to effect, she at least has the right to proceed under Section 75(s), as amended, and obtain the relief that statute affords her. Her case is even stronger than the *Ledwidge* case in that there has been no foreclosure here, and consequently no prejudice to the secured creditors resulting from the new proceedings, as there was in the case referred to.

*Phoenix Joint Stock Land Bank of Kansas City v. Ledwidge,* 86 Fed.(2nd) 355.

## III.

8. CREDITORS STATE THAT DEBTOR'S PETITION FOR A COMPOSITION IS INSUFFICIENT IN LAW AND DOES NOT STATE A GROUND FOR RELIEF UNDER SECTION 75 (A TO R).

THE ORDER OF DISMISSAL IF BASED UPON THIS GROUND IS ERRONEOUS IN THAT DEBTOR FILED A FORM OF PETITION APPROVED BY THE UNITED STATES SUPREME COURT AND HER PETITION WAS SPECIFICALLY APPROVED BY THE UNITED STATES DISTRICT COURT ON THE 23D DAY OF JUNE, 1936 (PRINTED TRANSCRIPT, PAGE 36).

Appellant's petition is sufficient in law and states a ground for relief under Section 75 (a-r) of the Bankruptcy Act for two self-sufficient reasons.

In the first place appellant alleges she is a farmer, personally bona fide engaged primarily in farming operations, and that she is insolvent or unable to meet her debts as they mature, and that she desires to effect a composition or extension of time to pay her debts under Section 75 of the Bankruptcy Act. These are the identical jurisdictional prerequisites enumerated in Sub-section (c) of Section 75.

Secondly, appellant's petition contains the facts, and is in the form prescribed by the Supreme Court of the United States as the official form for a petition in bankruptcy under Section 75 of the Bankruptcy Act.

*Appendix IV, United States Supreme Court Reports,* 77 L. E. 1517;
*Bankruptcy Act,* Section 75 (c), 11 U. S. C. A. § 203 (c).

In conclusion, it is respectfully submitted that appellant's petition was filed with express authority of law; that the United States District Court had jurisdiction to entertain the proceedings under Section 75 (a-r) although they were instituted by the same debtor who had theretofore filed her petition, and later, voluntarily moved for a dismissal which was granted.

It is submitted further that debtor's petition states facts sufficient to constitute ground for relief under Section 75 (a-r) of the Bankruptcy Act, and that it is sufficient in law.

Dated: April 26, 1937.

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